Hydrotherm, Inc. *and* Petroleum, Construction, Tankline Drivers, Yeast, Soft Drink Workers and Driver-Salesmen, Amusement and Vending Servicemen and Allied Workers, Local Union No. 311 of Baltimore and Vicinity, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 5–CA–19338

May 16, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On July 11, 1989, Administrative Law Judge Walter Maloney issued the attached decision. The Respondent filed exceptions with a supporting brief. The Acting General Counsel filed a brief in answer to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as amplified below,[3] and to adopt the recommended Order.

[1] On October 2, 1989, the Acting General Counsel filed a motion to strike the Respondent's Exception 1 and related portions of the Respondent's brief in support of its exceptions, as well as an affidavit pertaining to that exception which the Respondent appended to its brief. On the same day, the Acting General Counsel also moved to supplement the formal record in this case to introduce material in support of the motion to strike. In light of the following findings, we need not pass on these motions.

Exception 1 alleges bias and prejudice on the part of the administrative law judge. In furtherance of this exception, the Respondent attacks the conduct of the judge at the hearing, as well as the bias it claims is apparent in his decision, which it argues caused him to distort the record to enable him to find against the Respondent. Insofar as the exception attempts to attack the judge's conduct at the hearing, it is untimely raised, because the Respondent failed to object to the judge's actions during the hearing or before his decision issued, as required under Sec. 102.41 of the Board's Rules and Regulations. *Waterbed World*, 286 NLRB 425 fn. 1 (1987). Similarly, the exception is untimely as a motion to disqualify the judge. Such motions must be made before the judge files his decision. Sec. 102.37 of the Board's Rules and Regulations. *R. Waldo, Inc.*, 280 NLRB 1237 at fn. 1 (1986). Finally, although the exception is not untimely to the extent it alleges bias and prejudice in the judge's decision itself, it has no merit. After careful examination of the record and the decision, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias, hostility, or prejudice against the Respondent.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We do not subscribe to some of the language the judge used to express his findings and conclusions. Specifically, we do not endorse his characterization of the Respondent's proposals as ''bizarre,'' ''far-out,'' and ''off-the-wall'' but for the reasons stated in our decision, we agree with the judge that the Respondent's proposals, considered as a whole, permit an inference that the Respondent was not bargaining in good faith.

I. FACTS

A. *Background*

On May 12, 1983, the Union won a Board-conducted representation election. The Respondent subsequently filed objections which were overruled by the Regional Director and, on appeal, by the Board. 270 NLRB 1131 (1984). After the Respondent refused to bargain, a complaint was issued against it, a hearing was held, and the Respondent was found guilty of violating Section 8(a)(5) of the Act. On August 7, 1986, the Board affirmed that adjudication and directed the Respondent to bargain with the Union. 280 NLRB 1425. When the Respondent again refused, the General Counsel filed a petition for enforcement in the United States Court of Appeals for the Fourth Circuit, which was granted on August 5, 1987. 824 F.2d 332. After the court's order issued, the Respondent agreed to meet with the Union.

B. *Proposals Advanced During the Seven Bargaining Sessions*

Between September 17 and December 9, 1987, the parties met seven times. At the first meeting, the parties discussed the Union's package of proposals, which the Union had delivered to the Respondent prior to the session. The Respondent presented only one written proposal at the first meeting, entitled ''Management Functions.'' This proposal vested all authority in the Respondent over numerous subjects, including the following: scheduling of work, job descriptions, size and makeup of the work force (i.e., the bargaining unit), bonus or incentive compensation, subcontracting of work, safety, the making and enforcement of work rules, hiring, demotion, discharge, and layoff. Also at the first session, the Respondent obtained the Union's consent to a set of ground rules for the negotiations, including one mandating confidentiality of the matters discussed.[4]

At the second meeting, on October 8, the Respondent presented its proposal. This proposal included no provisions on wages or fringe benefits, such as health insurance or pensions. The Respondent's representative said the Respondent would furnish proposed wage schedules, but it never did so. Nor did the Respondent counter any of the Union's proposals on wages or benefits.[5] Discussion of wages throughout the period of bargaining was limited to the Respondent's existing system of annual merit increases and, as explained

[4] The Respondent breached the parties' confidentiality agreement between the second and third bargaining sessions, when it placed copies of the parties' proposals near the timeclock.

[5] The Respondent's senior vice president, Paul O'Rourke, who was a lead negotiator for the Respondent, testified that even when the Respondent's negotiating team met on December 22, ostensibly in preparation for a bargaining session that might be scheduled during the new year, it still did not formulate any wage proposal to be submitted to the Union.

below, on this subject, the Respondent's bargaining position amounted to a take-it-or-leave-it proposal in which the Union could forestall cancellation of a scheduled annual merit evaluation only by forgoing all bargaining over wages for the coming year.

The Respondent's October 8 proposal also included the following provisions. Section 1.4.3 on ''Temporary Employees'' stated:

> Temporary employees are those employees hired to work on a specific project *or* for a specific period of time *or* from time to time to accommodate seasonal increases in the Employer's volume. *Temporary employees derive no benefits under this Agreement, and their wage rates are established by the Employer*. [Emphasis added.]

The broad management functions clause previously offered, which appeared to encompass virtually all aspects of working conditions, was again presented. Although arguably subject to any limitations specified in other provisions of the contract, the Respondent's proposals on other subjects also contained language that essentially retained all the discretion for the Respondent.

The seniority article (art. IV), for example, provided that seniority would apply to decisions on layoff, recall, overtime, and promotion only if ''job classifications, qualifications, abilities, experience, and skills of two or more employees are, *in the sole judgment of the Employer, equal* . . . .'' When the Respondent, in its sole judgment, finds that such equality exists, it need give seniority only ''due consideration'' when making a decision.

The hours of work article (art. V) contained a section on paid ''breaks'' (sec. 5.5) which stated that these would be ''at times and for periods to be announced [by supervisors] at the time the break is scheduled.''

Pursuant to section 15.1 of the proposal, there was to be ''no limitation on the Employer's right to use nonunit personnel to perform bargaining unit work.'' This was later (in the November 18 bargaining session) modified to allow subcontracting of unit work ''due to capacity constraints or for competitive economic reasons.'' Neither of these limitations was defined.

The grievance procedure provision (art. VII) in the October 8 proposal required an employee, as a first step, to put his grievance into writing, with specification of the facts and citation to particular contract clauses. Although the provision did not expressly bar the employee from seeking the assistance of the union steward or alternate, section 3.2 barred the steward from any involvement in a grievance or other union business during worktime, except for breaks or meal periods. With the exception of a 30-minute lunch period, as explained above, there were to be no scheduled breaks.

The arbitration article (art. VII) provided that an arbitrator would have no authority to alter ''any wage rate or wage structure'' or ''in the case of discipline to alter the penalty imposed by the Employer.'' In the event of a discharge or other termination, the arbitrator would ''have no authority to order reinstatement or back pay.'' Language in the strikes and lockouts clause indicated that discharges would not, in any event, be arbitrable.

The article on strikes and lockouts (art. IX) contained broad no-strike and no-lockout clauses, with an exception for strikes over discharges and other ''matters not subject to the grievance and arbitration procedure.'' Any strike the Union called over any ''disciplinary action, including discharge,'' could not be considered an unfair labor practice strike, but would be deemed ''an economic strike,'' with the Respondent enjoying all the concomitant rights to replace striking employees.

In article X, the Respondent provided (sec. 10.1) that it would discharge or suspend only for ''just cause,'' which was defined as ''any violation of a written rule of the Employer issued pursuant to its management rights as set forth in Article 2 or any violation of accepted principles of decency, law, or moral behavior.'' Section 10.2 reiterated both the prohibition on an arbitrator's giving backpay or reinstatement as a discharge remedy and the description of the Union's right to strike as consisting of the right to ''call an economic strike to protest a discharge.'' Although the provisions on seniority, grievance and arbitration, and strikes and lockouts were not contained in the groups of proposals proffered by the Respondent in the bargaining sessions of November 18 and December 3, it never offered any revised proposals on these topics or suggested that it was backing away from them in any way.

At the third bargaining session, on October 14, the parties discussed some items in the Union's initial package proposal that tracked established practices at the plant. Referring to these (including ones it had earlier appeared to accept), the Respondent's chief negotiator stated that the Respondent did not agree to those items and that bargaining would ''start from scratch.''

The Respondent offered no new proposals at the October 27 meeting. At the November 18 meeting, it offered a provision on jury duty pay that put the existing practice into the contract, and a safety and health article (art. XVIII) limited to providing that the Respondent would obey state laws on health and safety, would permit the Union to call the Respondent's ''attention'' to such matters, would furnish ''required safety devices'' to the employees at its own expense, and would have the right to discipline any employee who failed to use such equipment. The Union agreed to both the jury duty and safety and health proposals at this meet-

ing. The parties also agreed on a proposal offered by the Union on holidays. As agreed to (with slight modification), this essentially continued the past practice at the plant, except that employees were guaranteed 8 hours' reporting pay, rather than 4 hours.[6]

The article on ''Wages'' (art. VI) was identical to that offered on October 8, i.e., it referred to a wage schedule without providing one; it provided overtime pay at the rate required by Federal law; it allowed the Respondent to give individual merit increases at will; and it granted 4 hours' reporting pay (thereby continuing the current practice). One concession was agreed to in the article at this session. The Respondent agreed to strike language which would deem employees to have waived any claim of a wage discrepancy if the claim was not made within 2 weeks of the payday involved.

The last written proposals submitted by the Respondent were offered at the December 3 meeting. They concerned only a few subjects, but the Respondent agreed at this time to modify a previously agreed-upon proposal on probationary employees by accepting a change from 90 days to 60 days for the probationary period and granting these employees most contract benefits. (The Union also thereby compromised the position in its original proposal, which had provided for a 45-day probationary period.) There were no revised proposals presented on management rights, temporary employees, grievance and arbitration, or the treatment of discharge and discipline.

The Union asked whether there might be limitations on the *numbers* of employees who could be hired as ''temporary'' employees (i.e., employees without contract benefits whose wages would be unilaterally set by the Respondent), but the Respondent's representatives refused to agree to any such limitation. They suggested that the Respondent might consider a limit of 7 months on the amount of time that employees could be called ''temporary'' and some coverage under the contract, but nothing was ever proffered in writing as a modification of the ''temporary employee'' proposal that was on the table.

In the final session, on December 9, the two sides argued mainly about the management functions proposal and the issue of a union-security clause. The Union, aware that the Respondent had a union-shop provision in its contract at another plant, had included a union-security provision in its proposal from the very beginning. O'Rourke, the Respondent's principal negotiator, testified that he knew that a ''union shop'' was very important to the Union, that the Union was not likely to back off on it, and that this issue would be ''a major stumbling block'' in negotiations. He further testified that in the very first bargaining session, he made the first of a series of ''speeches'' about the Respondent's strong opposition to union-shop clauses and that he ''kept bringing it up'' at later sessions. The basis for the Respondent's opposition, as explained by O'Rourke, was the closeness of the election in which the Union had been certified and the Respondent's view that the management negotiators—and not the union negotiators—''were representing'' the employees who had voted against the Union in the election.

At the final session, O'Rourke told the union representatives that the Respondent was going ahead with a delayed implementation of scheduled annual merit raises and that it saw no reason for further meetings—''nothing for [the parties] to talk about''—unless the Union agreed to drop its insistence on a union-security proposal and to forgo presenting any wage proposals that would be effective for any period before November 1 of the following year. The Respondent's negotiators then rose, gathered their papers, and left the room after warning the union negotiators to prepare for a strike.

No date was set for a new negotiating meeting, but it was understood that Union Negotiator Robert Cremen should call one of the Respondent's representatives to arrange a date after January 1.

C. *The Respondent's Actions Concerning Employees' Regular Annual Merit Increases Under the Existing System*

The wage system in existence when the parties began bargaining for a contract included an annual merit wage review in which employees were evaluated by their foremen in the fall and, on the basis of those evaluations, a number of them (but not all) were given wage increases. The schedule for granting the increases had become fixed; Senior Vice President O'Rourke testified that the Respondent was ''pretty rigid'' about giving these increases around November 1 each year.

At the fourth meeting, on October 27, Union Bargaining Representative Cremen complained to the Respondent's negotiators that supervisors in the plant were telling employees that they would not receive merit evaluations and increases that year. Cremen indicated that this practice could continue as before; the Union did not demand bargaining over the amounts or other details of these increases. The Respondent's negotiators replied that they took this to mean that the Union would forgo even putting forward any proposals

[6] The reporting pay provision has a practical effect only if the work that an employee is called in to perform on a holiday does not, in fact, take up an entire 8-hour shift, i.e., the provision guarantees 8 hours' pay whether the employee works the full 8 hours or not. Senior Vice President O'Rourke, the Respondent's principal negotiator, conceded in his testimony that no one was called in to work on a holiday unless the Respondent had ''a major, major problem'' and that the Respondent had never had to pay anyone for hours not worked under the existing 4-hour guarantee.

The holiday provision as agreed to also included a concession by the Union, which accepted the Respondent's addition of language providing that it would be ''at option of the Company'' whether an employee who was on vacation during a paid holiday would receive an additional day added onto his paid vacation or simply an additional day off at some other time.

for a general wage increase during the coming year. Cremen replied that the Union did not agree, as the price for the Respondent's giving the scheduled merit incrases, to surrender the right to negotiate for a general wage increase, i.e., one that would affect all employees.

The Respondent did not grant any merit increases on November 1. In a letter to the Respondent dated November 3, Cremen reiterated the Union's position:

> The Union has no objection, and in fact encourages, the Company to conduct its yearly evaluation of the employees at your plant and to grant wage increases based on such evaluations.
>
> The Union retains its right to negotiate wage increase[s] during the process of collective bargaining independent of any evaluation increases which the Company may grant during this process.

At the November 18 negotiating session, the Respondent reiterated its position that, although it wanted to make the merit evaluations and grant increases accordingly, it planned to do so only if the Union agreed to forgo putting any other wage increases on the table that might take effect at any time during the coming year. As one of the Respondent's negotiators put it at the November 18 meeting, the Respondent was not ''giving the merit increases away.''

According to the testimony of Senior Vice President O'Rourke, the Respondent wanted, for its own purposes, to give the raises, because the employees had come to expect them at the beginning of November, which was the Respondent's busiest time of year, and failing to give them would have an adverse effect on morale and production.

At the December 3 session, the Respondent showed the Union a list of employees with the amounts of merit increases that would be given pursuant to the November evaluations. Its position regarding the consequences for wage negotiations of implementing the increases remained the same. At the final session on December 9, as described above, the Respondent announced that it would implement the increases.

On December 15, the Respondent delivered a letter to each bargaining unit employee stating as follows:

> [S]ince late October, the Company has been attempting to implement this wage increase in bargaining with Local 311 in accordance with legal requirements.
>
> Because we expect a long bargaining process (many issues important to you to be agreed to), we proposed to the Union on 10/27 that this increase be part of the contract. They refused to agree to this.
>
> On 12/13 we proposed the wage increase you received.
>
> The Union said they would agree only if we agreed to further increases in 6 months and a Union Shop.
>
> On December 10, we made our proposal again and the Union answered in a similar manner.
>
> We told the Union that we can't agree to things like that because we must protect *your jobs and the Company* now and for the future.
>
> We decided to give the increase anyway because we feel you should not suffer further from the bargaining.

After learning of this letter, the Union filed unfair labor practice charges with the Board and refrained from approaching the Respondent to set a new bargaining session. The Respondent likewise refrained from seeking further negotiations.[7]

II. ANALYSIS

A. *General Principles*

The complaint alleges that the Respondent engaged in overall bad-faith bargaining, or ''surface bargaining,'' during the parties' negotiations. The Respondent denies that it engaged in surface bargaining, urging instead that the Union was to blame for the breakdown in negotiations, and claiming that the unwavering positions it took were merely part of a negotiating ploy that it was willing to abandon under proper circumstances.

After reviewing the record evidence, the judge found that the Respondent's behavior exceeded lawful ''hard bargaining'' and instead demonstrated bad faith. We agree with that conclusion for the reasons stated below.

In arriving at our conclusion, we are mindful that good-faith bargaining may be quite hard and still lawful. *Reichhold Chemicals*, 288 NLRB 69, 69–70 (1988), affd. in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990). In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, we will seldom find direct evidence of a party's intent to frustrate the bargaining process. Rather, we must look at all of its conduct, both away from the bargaining table and at the table, including the substance of the proposals on which the party has insisted. *Teamsters Local 515 v. NLRB*, supra, 906 F.2d at 726–727; *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 874 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984), enfg. 265 NLRB 850 (1982); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984); *NLRB v. Mar-Len Cabinets*, 659 F.2d 995, 999 (9th Cir. 1981). Such an examination is not intended to measure the intrinsic

[7] We deny the Respondent's motion to reopen the record to accept evidence concerning an alleged resumption of contract negotiations with the Union after the hearing concluded.

worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mindset open to agreement or one that is opposed to true give-and-take. Id.

In our view, as explained in section B, below, the totality of the positions taken by the Respondent throughout the seven bargaining sessions and the manner in which the Respondent advanced those positions are inconsistent with a good-faith approach to negotiations. The Respondent argues, however, that, contrary to the judge's finding, it did not intend finally to insist on all those positions. Rather, it contends, it was deprived of an opportunity to reveal its willingness to compromise by the Union's conduct after the seventh bargaining session—filing an unfair labor practice charge and failing to schedule a new negotiating session. For the reasons set forth below in section C, we reject that argument.

B. *The Respondent's Proposals Viewed as a Whole*

In order to assess the significance of the Respondent's proposals, it is essential to keep in mind the rights that a union possesses even in the absence of a contract, simply by virtue of being the employees' exclusive representative within the meaning of the Act. See *Prentice-Hall, Inc.*, 290 NLRB 646 (1989). The Respondent's proposals on key issues amounted to little more than a demand for the surrender of certain of those rights. An examination of the interacting operation of four proposals in particular—the management functions clause, the discharge and suspension clause, the grievance/arbitration clause, and the clause governing strikes—serves to illustrate the point.

The following rights and obligations under the Act would pertain in the absence of any contract if the Respondent here, for example, sought to discharge a union steward for violating a plant rule that those who were not supporters of the Union were allowed to violate with impunity. In the first place, if the rule in question were one that had not existed prior to the Union's certification, the Respondent would have been obligated to give the Union notice and an opportunity to bargain before imposing it. Second, the Union would be free to strike over the discharge, and such a strike would be deemed an unfair labor practice strike, with the employees entitled to retrieve their jobs upon their unconditional offer to return. Under the Respondent's proposals, the Union would have no voice in the making of plant rules, because the Respondent was allowed to act unilaterally on this, as well as almost every other aspect of wages and working conditions, pursuant to its management functions clause. Although the Union might be able to grieve the discharge through arbitration, such a course of action would be futile: the discharge would necessarily be found to be for ''just cause,'' because under section 10.1, a ''just cause'' discharge would include any discharge that was imposed for violation of *any* rule that the Respondent issued under the unrestricted rulemaking powers granted to it in the management functions clause. Furthermore, even if an arbitrator should decide that the discharge was not for ''just cause'' because others escaped punishment for overtly engaging in the same conduct as the union steward, the arbitrator would not be empowered to award the employee either reinstatement or backpay. Finally, if the Union (taking advantage of a limited exception to the broad no-strike clause) struck over the discharge, the strike would be deemed an economic strike.

Of course, a union might be willing to accept such comprehensive restrictions on the employees' statutory rights if the employer were offering something significant in return. The mere insistence on a waiver of statutory rights as part of an employer's overall bargaining position does not require a finding of bad faith. *Reichhold Chemicals*, supra, 288 NLRB at 71, affd. *Teamsters Local 515 v. NLRB*, supra, 906 F.2d at 727–728. But unlike the employer in *Reichhold*, which made significant movement in bargaining on important subjects (288 NLRB at 70), the Respondent here was offering little more than the status quo in return for these sweeping waivers.

In defense of the Respondent's lack of movement during negotiations, O'Rourke, the Respondent's principal negotiator, testified that the Respondent was reluctant to soften its positions because it believed the Union was showing insufficient movement. Yet, with few and minor exceptions, the agreements that the parties had reached represented either the Union's acceptance of current terms and conditions or the incorporation in the contract of obligations that were imposed on the Respondent by law even without a contract.[8]

[8] The Respondent in its brief lists 15 items on which it claims the parties reached agreement. In fact, the record does not bear out the claim that agreement was reached on two of those listed (hours of work and leaves of absence).

Of the other 13, 4 delineated conduct required of the Respondent by statute or court order (union recognition, nondiscrimination, selective service, and safety and welfare). One, ''Special Agreements,'' approximates the duties of the parties under the Act.

Four others, concerning jury duty leave, overtime, adjustment of pay discrepancies, and holidays, generally set forth the Respondent's current practice. (Three of those—pay discrepancies, overtime, and jury duty leave—required bargaining over several sessions before the Respondent backed off from its demands for reductions in these benefits and agreed to continue its current practice.)

The agreement on ''just cause'' hardly represented hard bargaining by the Union in view of the broad definition it incorporated. The agreements on definitions of full-time and part-time work and probationary employees were rendered illusory by provisions of the Respondent's other proposals—notably, the management functions clause; the Respondent's reservation of the right to subcontract out unit work whenever it determined that ''capacity constraints'' or ''competitive economic reasons'' made this desirable; and the Respondent's reservation of the right to hire ''temporary employees,'' broadly and vaguely defined, without limitation on the numbers of employees hired. (The Respondent's negotiators orally suggested they might consider a 7-month limit on employment that could be deemed ''temporary.'')

The subjects agreed on were, in fact, remarkably similar to those agreed on by the parties in *A-1 King Size Sandwiches*, supra, 265 NLRB at 851.

In sum, the Respondent's proposals, considered as a whole, would have left the employees and their representative with less than they would enjoy by simply relying on the certification, without a contract. This is not the conduct of an employer sincerely attempting to reach an agreement, and it is not good-faith bargaining. *NLRB v. A-1 King Size Sandwiches*, supra, 732 F.2d at 874.

C. *The Respondent's Conditions on Further Bargaining*

As noted above, at the final bargaining session between the parties, O'Rourke told the Union's representatives that he saw nothing further ''to talk about'' unless the Union agreed to drop its demand for a union-security clause and to forgo making any proposals on wages for the year beginning on the first of the previous month (November 1). Given the manner in which the Respondent had bargained on these two subjects, and given the absence of any sign there was likely to be serious movement on the major proposals described in section B, above, the Union was warranted in concluding that the Respondent was not prepared to continue negotiations in good faith. The Union's belief that further sessions would be futile is especially justified in light of the Respondent's failure to display a willingness to bargain over its proposals on several crucial subjects, for example, the grievance and arbitration and discipline and discharge clauses. Although the Respondent's witness later testified that Respondent in fact harbored a continued willingness to bargain, the record does not demonstrate that the Respondent sufficiently conveyed these sentiments to union negotiators. Thus, because the Union received no intimations from the Respondent that meaningful movement might occur, there was no separate basis for it to pursue further talks after the Respondent laid down the conditions described above.

The Respondent is correct in arguing that, just as a union does not violate the Act by aggressively pressing a demand for a union-security clause, so an employer does not violate the Act simply by refusing to agree to such a demand. The Respondent's stated reasons for its position, however, revealed a fundamental unwillingness to accept the Union in its proper role as the exclusive representative of all the bargaining unit employees. Thus, in opposing the Union's proposals, the Respondent's representatives pointed to the slender margin (59–56) by which the Union had won the representation election in 1983. The Respondent's representatives openly stated their view (not based on any communications from employees themselves) that many employees must still oppose the Union after the lengthy period taken up by the Respondent's test of the certification, and arrogated to themselves the function of representing the interests of those employees. As O'Rourke testified in describing his set negotiating ''speech'' on the subject of a union-shop clause, ''we felt that we—we 3 guys on the company's side of the table—were representing those employees,'' i.e., the employees whom it presumed to be opponents of the Union. As the judge aptly observed, the Respondent's ''whole attitude, throughout the fall of 1987 and beyond, has been that negotiations were simply a continuation of the campaign it had been waging for 4 years to keep the Union out of the plant entirely.''

The Respondent's dealings with both the Union and its employees on the subject of wages were similarly marked by bad faith. As explained in section I, above, when the parties sat down at the negotiating table in the fall of 1987, an existing condition of employment for the unit employees was an annual wage review at the beginning of November during which merit increases would be given to a number of them. This condition, did not, of course, constrain the Respondent in what it could put forth as its bargaining proposal for wages during the year following that November 1 date. It was free, inter alia, to propose—as it did—that wage increases for that period be limited to the scheduled merit increases, granted according to the standards established in the past. It could even have proposed less, as long as that proposal was offered in good faith.[9] It was not acting in good faith, however, when it stated that the scheduled wage increases would be granted only if the Union agreed to put forward no counterproposal whatsoever. In other words, the Respondent's position on wages was that the Union had only two choices—(1) forgo any negotiations over contending positions and accept the Respondent's first proposal (the status quo) or (2) accept cancellation of the scheduled increases as the price for having its own wage proposals considered by the Respondent.

Finally, the agreement on ''Union Business and Visitation Rights'' signifies the Union's willingness to compromise. Although the provision did grant the Union space in the Respondent's premises for a union bulletin board, it also specified that the bulletin board was to be provided at the Union's expense. Similarly, although it was specified that the Respondent could not act ''unreasonably'' in withholding permission for union representatives to visit the facility on any given occasion, such representatives were not free to speak with the employees at the end of their shifts but only during their meal periods or breaktimes. The Respondent never, however, during the seven bargaining sessions, proposed that there could be any scheduled breaks other than 30-minute meal periods.

[9] As explained in sec. I, supra, however, the Respondent had no business reasons for offering less, because its own admitted operational needs called for implementation of the scheduled merit increases.

The Respondent characterized this as merely a shrewd tactic to avoid ''giving the merit increases away,'' but a similar strategy by an employer aimed at ''improv[ing] its bargaining position in . . . anticipated negotiations with the Union'' was found by the Board and a reviewing court to be bad-faith bargaining destructive of employee rights. *NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1110 (2d Cir. 1973). See also *Thill, Inc.*, 298 NLRB 688 (1990) (employer acted unlawfully in treating a scheduled wage cut restoration as a condition that the union would have to negotiate in order to restore).

As in *Thill*, supra, the Respondent compounded its bad faith by its communications with its employees. The Union had never opposed the granting of the annual merit increase, but merely sought to pursue its right to put on the negotiating table a proposal for more (e.g., for a general increase that would also benefit employees bypassed in the merit review). Nonetheless, the Respondent—after first withholding the increase to its employees' dismay—sent them the December 15 letter in which it falsely portrayed the Union's position as one of allowing the Respondent to grant the November 1 merit increases only if the Respondent also granted additional increases in 6 months and included a union-shop clause in the contract. The letter also underscored the Respondent's picture of itself as the employees' true representative (''We told the Union we can't agree to things like that because we must protect *your jobs* . . . .''), and it sought to portray the process of collective bargaining as a harmful burden which the Union's victory had imposed on the employees. (''We decided to give [you] the increase anyway because we feel you should not suffer further from the bargaining.'')

In sum, there is no merit to the Respondent's contention that the Union's failure to seek further negotiating sessions after December 1987 amounted to a failure to put the Respondent's good faith to the test.[10] The Respondent's conduct during the seven bargaining sessions that took place and its parting remarks concerning what the Union must do in order for the parties to have anything ''to talk about'' made it entirely clear that further meetings were not likely to result in the good-faith bargaining to which the employees were entitled under the Act.

Conclusion

For the foregoing reasons, we agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union.

[10] Compare *Captain's Table*, 289 NLRB 22 (1988) (union failed to test employer's good faith when it filed unfair labor practice charges after four bargaining sessions in which the union itself had failed to offer counterproposals and to provide requested information in a timely fashion).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hydrotherm, Inc., Dundalk, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Steven L. Sokolow, Esq., for the General Counsel.
Frank L. Kollman, Esq., of Baltimore, Maryland, for the Respondent.
Joel A. Smith, Esq., of Lutherville, Maryland, for the Charging Party.

DECISION

FINDINGS OF FACT

I. STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Baltimore, Maryland, on an unfair labor practice complaint,[1] issued by the Regional Director for Region 5 of the National Labor Relations Board and later amended, which alleges that Respondent Hydrotherm, Inc. violated Section 8(a)(1) and (5) of the Act.[2] More particularly, the complaint alleges that, in negotiations which took place between September 17 and December 9, 1987, the Respondent engaged in overall subjective bad-faith bargaining, sometimes called surface bargaining, as evidenced by several aspects of its negotiating posture—insistence on an overly broad management-rights clause; assigning to the Respondent the unilateral right to establish wage rates for new or changed positions; the right to change incentive or bonus pay, and to make and enforce work rules; insistence that pay increases be limited to merit increases; insistence on an unlimited contract right to use nonunit employees to do bargaining unit work; insistence on grievance and arbitration provisions excluding union participation in certain steps of the grievance procedure and precluding an arbitrator from awarding reinstatement and backpay in discharge cases; and insistence on language which would waive any right of reinstatement for employees who struck in support of a discharged employee who was seeking reinstatement. The Respondent denies that it engaged in surface bargaining, places the blame for a breakdown in negotiations upon the Union, and urges that any positions it took which

[1] The principal docket entries in this case are as follows:

Charge filed by Petroleum, Construction, Tankline Drivers, Yeast, Soft Drink Workers and Driver-Salesmen, Amusement and Vending Servicemen and Allied Workers, Local Union No. 311 of Baltimore and Vicinity, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO (the Union) on January 6, 1988; complaint issued by the Regional Director for Region 5 on July 26, 1988; Respondent's answer filed on August 4, 1988; complaint amended on February 10, 1989; hearing held in Baltimore, Maryland, on March 1–3, 1989; briefs filed with me by the General Counsel and the Respondent on or before May 23, 1989.

[2] The Respondent admits, and I find, that it is a Delaware corporation which maintains a place of business in Dundalk, Maryland, where it is engaged in the manufacture of commercial and residential heating and hot water units. In the preceding year, it purchased and received at its Dundalk, Maryland plant directly from points and places located outside the State of Maryland goods and materials valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. (5) of the Act

seemed unduly harsh or restrictive were mere negotiating ploys which it was willing to abandon under proper circumstances. Upon these contentions the issues herein were joined.[3]

II. THE UNFAIR LABOR PRACTICES ALLEGED

A. *Background*

Respondent operates three plants which are engaged in the manufacturing of heating equipment. They are located in Missaugna, Ontario, Northvale, New Jersey, and Dundalk, Maryland. At the Northvale plant, where the Respondent's headquarters is located, it has maintained a collective-bargaining relationship with the Steelworkers for more than 10 years. The Dundalk plant involved in this proceeding has been in operation for more than 40 years, either under present management or under previous ownership. This plant has about 125 production and maintenance employees and had no collective-bargaining history before 1983, when events leading up to this case began to take place.

In the spring of 1983, the Union engaged in an organizing drive among the Respondent's Dundalk employees and filed a representation petition on March 22 of the year. On May 12, an election was held which the Union won by a vote of 59 to 56. The Respondent filed objections which the Regional Director overruled. On appeal, the Board also overruled the Respondent's objections and certified the Union on June 11, 1984. 270 NLRB 1131. On June 27, 1984, the Union wrote the Respondent, asking it to meet for the purpose of negotiating a contract. The Respondent refused to honor the certification, so a complaint was issued against it in Case 5–CA–16508. After a hearing before Administrative Law Judge Arlene Pacht, the Respondent was found guilty of a violation of Section 8(a)(5) of the Act. Again the Respondent appealed to the Board. On August 7, 1986, the Board affirmed Judge Pacht's decision and directed the Respondent to bargain with the Union. 280 NLRB 1425. Again the Respondent refused, so a petition to enforce the Board's Order was filed in the United States Court of Appeals for the Fourth Circuit. In a decision issued on August 5, 1987, the Fourth Circuit affirmed the Board and directed the Respondent to honor the certification which was issued in 1984 and to bargain with the Union. 824 F.2d 332.

Following the issuance of the decree of the court of appeals, the Respondent agreed to meet with the Union for purposes of collective bargaining so, in the fall of 1987, seven negotiating sessions took place.[4] The principal Company negotiator on these occasions was Paul G. O'Rourke, the Respondent's senior vice president. Except at the first meeting, the Union's principal negotiator was its secretary-treasurer, Robert G. Cremen. Prior to the commencement of these negotiations, union representatives held a meeting with bargaining unit personnel and solicited suggestions for proposals to be advanced at bargaining. At this meeting it also selected an in-plant bargaining committee. The Union formulated the suggestions it received into a single complete contract proposal containing 31 articles, including a detailed wage demand for each of 18 job classifications in the bargaining unit. On three points—jury duty pay, meal allowances for employees who work overtime, and shift differentials—the Union's initial proposals were slightly less than what the Respondent was then offering because bargaining unit personnel had misinformed union representatives concerning what they were receiving for these benefits.[5] The Union forwarded its contract proposal to O'Rourke before the first session began. The parties used it at the first session as the basis of much of the discussion that took place. The Respondent had nothing in writing to present to the Union at the first session, other than a detailed management-rights proposal[6] which was the subject of much discussion throughout negotiations, and a set of rules of conduct which the Company wanted the Union to agree to as the basis for conducting negotiations. The rules included such items as promptness for meetings, nonpayment of employees on the Union's bargaining committee, and the tentative nature of all items agreed to until a contract is signed. Of some importance was a statement contained in the proposed negotiating rules that ''parties to the meetings agree that when discussions of proposals and alternatives are 'agreed as confidential in the meeting,' such matters will be retained as confidential by all persons at the meeting.'' The Union agreed to all of these rules of conduct.

At the first meeting, as the parties were quickly going over the provisions of the Union's initial proposal, O'Rourke stated that the Company strongly opposed any union shop because it felt it had to defend the rights of the employees who had voted against the Union in the 1983 election. This was the first of several occasions on which O'Rourke voiced the same position respecting union security for the same reason. From time to time, the parties would come across a provision in the Union's proposal which was similar to or identical to present Company practice. On such occasions O'Rourke would point out that fact. When he did so, Gene Shiflett and Brian Griffin, who were representing the Union at the first

[3] Errors in the transcript have been noted and corrected.

[4] Those sessions took place at the Baltimore Travel Plaza Motel in Baltimore, Maryland, on September 17; October 8, 14, and 27; November 18; and December 3 and 9.

[5] A few employees even misrepresented to union agents the wage rates they were currently receiving.

[6] The Respondent's proposal, styled ''Section 2.1—Management Functions,'' read:

> All management rights, powers, authority, and functions, whether exercised, and regardless of the frequency of infrequently of their exercise, shall remain vested exclusively in the company. It is expressly recognized that such rights, powers, authority, and functions include, but are by no means limited to, the full and exclusive control, management, and operation of its business and its plant; the determination of the scope of its activities, products to be processed or manufactured, and the methods for processing and manufacturing; the location of such processing or manufacturing, the materials and products to be acquired or utilized, the machinery and equipment to be utilized, and their layout; the right to establish or change shifts, schedules of work, and production schedules and standards; the right to establish, change, combine, or eliminate jobs, positions, job classifications, and descriptions; the right to establish or change incentive or bonus compensation; the right to introduce new or improved procedures, methods, processes, facilities, machines, and equipment or make technological changes; the right to maintain order and efficiency; the right to contract or subcontract any work; determination of the number, size and location of its facilities or any part, and the extent to which the means and manner by which its facilities, or any part, shall be operated, relocated, shut down, or abandoned; the right to terminate, merge, consolidate, sell, or otherwise transfer its business or any part; the right to make and enforce safety, security, and work rules and rules of conduct; the determination of the number of employees, the assignment of their duties, and the right to change, increase, or reduce the duties; and the direction of the working forces, including but by no means limited to hiring, selecting, and training of new employees, and suspending, scheduling, assigning, discharging, laying off, recalling, promoting, retiring, demoting, and transferring its employees.

meeting, thought that he meant that the Company was agreeing to the Union proposal since it recited current company practice. They later found out that the Respondent was not agreeing to continue current practices in its responses to those proposals. It did not do so until much later and then only as to some current practices and policies. The meeting ended with the Company telling the Union that it wanted to compare the Union's health and welfare and pension plans with its own, since the Union's proposal dealt only with levels of contribution and not with levels of benefits.

At the second meeting on October 8 and thereafter, Cremen spoke for the Union. The Union corrected the original proposal it had made concerning overtime and shift differentials to conform with the slightly higher amount which the Company was then paying (10 percent of base pay rather than 40 cents extra). It also removed the 10-day cap on jury duty pay to conform to the unlimited number of paid jury days currently allowed by the Company. The parties disputed the Union's provision prohibiting the farming out of bargaining unit work. The Company's position was that it had a seasonal operation and there were times when it needed to engage in subcontracting to get work out in a hurry. The parties discussed holidays, vacations, an 8-hour guarantee, superseniority for shop stewards, and pay deductions to be transmitted to the company credit union. No agreements were reached. They also discussed nondiscrimination and selective service. O'Rourke said he had no objection to the Union's proposals on these items. At the end of the meeting the Company gave the Union its first written proposals, which were drafts of language relating to a selected group of items in which the Company was interested. It was not a complete proposal and did not contain a wage offer. The Company never furnished the Union with a list of its present wage rates—job classes and progressions within grades.[7] In fact, throughout the entire course of bargaining in the fall of 1987, the Company never made a conventional wage proposal, limiting any wage improvement to a list of merit increases discussed infra. It also made no proposal dealing with health and welfare benefits or a pension plan. After looking through it hurriedly, Cremen complained that the Company's proposals made no provision for union security. Again O'Rourke pointed out to Cremen that the Company needed to defend the interests of employees who had voted against the Union in 1983. He added that this was a firm position which was agreed to by management from the top down. Cremen countered that it was also a major issue from the Union's standpoint. O'Rourke noted that the Company had told its employees all along that one thing the Union would do if it was selected was to insist on a union shop. Cremen asked O'Rourke on one occasion why he had a union shop at the New Jersey plant but was unwilling to grant such a provision at Dundalk, but he did not receive a responsive answer.

Sometime between the second and third meeting, which took place on October 14, the Respondent placed copies of its proposal and the Union's proposal near the timeclock in the plant and distributed them to bargaining unit personnel. O'Rourke admitted doing so at the October 14 meeting and was criticized by Cremen for violating the confidentiality provision in the agreed rules of conduct. Cremen noted that the company proposal omitted certain items that the Union thought had been agreed upon, to which O'Rourke replied that some of the Company's bargaining objectives had changed and that bargaining would start from scratch. Cremen noted that, among the Company's proposals, there was no provision on nondiscrimination. O'Rourke's comment was that they did not have to place items in a contract which were already a part of the general law. Cremen also commented that the Company had proposed only that rest breaks be taken as scheduled by the supervisor, whereas the Company's present practice was to have scheduled breaks during the morning and afternoon. Cremen asked O'Rourke if he was taking away the employees' existing breaktimes. O'Rourke admitted that this was what they were proposing. Later, O'Rourke stated that the Company would agree to specific breaktimes if the Union would forgo its insistence on union shop.[8] Cremen told O'Rourke that this was not a fair exchange and rejected it without further comment.

During this session, the parties went over other provisions of the Company's proposal. The Union objected to a proposal making new employees probationary for a period of 90 working days after they were hired, with an option on the part of the Company to prolong this status for another 30 working days. In particular, the Union did not like the provision precluding probationary employees from having access to the grievance procedure. Cremen and O'Rourke also had one of several exchanges concerning the management functions clause set forth in footnote 6 above. Cremen told O'Rourke that, by agreeing to such a clause, the Union would be giving up its right to represent the bargaining unit and it refused to do so. Whenever, in later negotiations, this matter came up, Cremen made the same response. O'Rourke wanted Cremen to go through the clause line by line and phrase by phrase to tell him exactly what he did not like about the provision. Cremen's standard reply was that he did not like any of it. The original Union proposal did not have a management-rights provision. At a later meeting, Cremen proposed a substitute provision, drawn from the language in one of the Union's other contracts,[9] which essentially said in simple terms that management had the right to manage. O'Rourke told Cremen that the company proposals made no mention of safety matters since the Company did not think that the Union had anything to contribute to the maintenance or improvement of plant safety. The Union objected to a company proposal that union representatives could enter the plant only at the Company's discretion. The parties agreed to a proviso to this proposal to the effect that Union access to the plant would not be unreasonably withheld.

The Company had also proposed that there would be only one shop steward for its plant, which employed about 125 people, and that he could investigate and process grievances only on breaktime or other off-duty time. The proposal said that an employee could present a grievance directly to management but had to do so within 3 days of the event being

[7] Sec. 6.1 of the Company's proposal given to the Union on October 8 stated: ''All employees covered in this Agreement shall receive the wages set forth in Appendix I.'' However, there was no appendix I and it was never supplied.

[8] There seems to be a difference of opinion as to whether this proposal engendered laughter among the participants in the negotiations. Apparently some laughed and others did not.

[9] Local 311 is one of the larger labor organizations in the Baltimore metropolitan area. It negotiates and administers an estimated 125–150 contracts. Until his retirement, Cremen had been an official of this organization for more than 20 years.

complained about. It laid down a further requirement that any grievance had to be in writing and had to set forth in detail the complaint and the specific provision of the contract which was being violated. Failure to observe any of these requirements would void the grievance. Cremen complained that it would be impossible for a shop steward to investigate and process grievances during breaktimes when another provision of the company proposal would permit the Respondent to eliminate breaks or call them only at the foreman's discretion.

The Union also objected to the company proposal which said that an employee could lose seniority by being absent for a day without calling in and for several other attendance-related infractions. It noted that the Respondent was currently paying overtime after 8 hours of work in any one day, so it questioned the Company's proposal that it would pay overtime only after 40 hours of work in a week, arguing that this was less than current practice. When Cremen countered with the suggestion that the parties agree to the Company's present practice on overtime, O'Rourke refused, saying that bargaining starts from scratch.

The Union also had objections to several facets of the Respondent's proposal concerning arbitration. The Respondent proposed that, when a grievance was referred to arbitration, any party could insist on being presented with three successive lists of arbitrators and could object to each entire list until the third list was submitted. The Union called this proposal mere time wasting. The proposal also stated that an arbitrator had no power to award reinstatement or backpay in a discharge case and that the employees could strike over the discharge of a fellow employee, but any such strike would be deemed an economic strike rather than an unfair labor practice strike. Cremen noted that there was a standard grievance and arbitration provision in the contract which the Respondent negotiated with the Steelworkers in New Jersey and complained that it was ridiculous to empower an arbitrator to hear a discharge case but prevent him from granting a meaningful remedy. O'Rourke's rejoinder was that remedies should be up to the Company and that it did not want a third party running its business. Cremen also did not care for the provision in the company proposal that the prevailing party to an arbitration pay all of the costs. He told O'Rourke that the standard practice in the contracts which he had negotiated was that the expenses of the arbitrator were shared by both sides, regardless of who won.

The Respondent has followed a practice for several years of granting merit increases each year on the first of November. As O'Rourke put it, ''it's pretty rigid'' that the Company give these increases around November 1. Each member of the bargaining unit is evaluated by his foreman and, following the submission of these evaluations to higher management, hourly rate increases are given in varying amounts. In some instances, no increases may be given. O'Rourke testified that it is important to management to be able to grant these increases each fall because employees have come to expect them at that time. He added that the fall of the year is the Respondent's busy time and a failure of the Company to provide expected wage increases could bring about a serious morale problem in the shop which might affect production. He also noted that the Company was having difficulty in recruiting new employees at its 1987 wage scale. At the fourth bargaining session on October 27, Cremen told management representatives that he was receiving reports that supervisors in the plant were telling employees that there would be no merit increases because collective bargaining was in progress. He announced that the Union had no objection to a continuation of the Respondent's past practice and that management was free to grant merit increases to unit employees as it had previously done. O'Rourke's reply was to thank Cremen for relinquishing the Union's right to bargain over wages. Cremen said he had done no such thing but had merely stated that the Union had no objection to a continuation of the Respondent's past practice regarding merit increases. According to O'Rourke, he proposed that merit increases be handled by what he called a ''Gentlemen's Agreement,'' which he defined on the record as an oral arrangement which could be put into effect but which neither side would have any obligation to agree to as part of a final written contract.

The parties went on to discuss other subjects but, during that discussion, O'Rourke came back to the subject of merit increases and proposed that the Company should grant these increases in exchange for an agreement on the part of the Union that it would not ask for any additional increases for a year. His argument was that the Company did not want to be in the position of having to grant two wage increases in the course of a single year. Cremen refused, saying that his earlier statement had referred only to the Company's practice of granting merit increases on November 1 and to nothing else. A few days later, Cremen confirmed his statement in writing by a letter to Plant Manager David Tucker, dated November 3. In that letter he wrote:

> The purpose of this letter is to restate the Union's position on yearly evaluations and wage increases that are due in November, 1987.
>
> The Union has no objection, and in fact encourages, the Company to conduct its yearly evaluation of employees at your plant and to grant wage increases based on such evaluations.
>
> The Union retains its right to negotiate wage increases during the process of collective bargaining independent of any evaluation increases which the Company may grant during this process.

At the October 27 meeting, the parties discussed subjects other than merit increases. The Union had prepared a number of individual sheets of paper containing the language of a number of minor items on which it thought there either was agreement or on which agreement might easily be obtained. The Union also presented its own management-rights proposal as a part of this package. The parties began to examine each of these items. The Respondent opened the discussion by objecting to the Union's proposed preamble to the contract, saying that it was unnecessary. The Company agreed to a recognition clause which embodied the language of the certification but felt that the language in the Union's proposal was not sufficiently detailed. There was no agreement on the subcontracting of bargaining unit work. The Company insisted on its own no-strike, no-lockout provision. Cremen argued that the language of his no-strike, no-lockout proposal was simple and direct and was drawn from the Company's agreement with the Steelworkers in New Jersey. In light of the company proposal limiting the power of arbitrators in

discharge cases, it had an additional proviso saying that the no-strike provision would be inapplicable if the Respondent failed to comply with an arbitrator's award. Cremen criticized the Company's no-strike proposal as being so detailed that it was internally contradictory. O'Rourke asked what would happen if a single member of the bargaining unit went on strike. Cremen's reply was that this would be an unauthorized strike, subject to internal union disciplinary procedures, and that Local 311 had a long history of living up to its no-strike contractual commitments because it preferred to use the grievance machinery to resolve disputes.

The parties next addressed the company proposal that all strikes to protest discharges be deemed economic strikes, in which case strikers could be permanently replaced. After taking a brief caucus, Cremen told O'Rourke that this language was unsatisfactory but added that the Union did not want to be striking in the first place. The parties again talked about the Company's original management functions proposal. Cremen reiterated his earlier objection that, if the Union agreed to the company proposal as stated, it would be giving up its right to represent the people in the bargaining unit and it would not do so. The Company, in turn, objected to the Union's nondiscrimination proposal, saying that it did not want to be fighting the Union and the EEOC at the same time.

There was agreement on some aspects of jury duty pay. After discussing the merit pay system, as outlined above, the Company asked Cremen to present a ''realistic'' general pay proposal so the Company could cost it out. The parties approached agreement on the number of paid holidays but agreement in this area was not firm. The parties addressed the Union's proposal relating to reemployment of former employees who were honorably discharged from the armed services. O'Rourke said he would have to let his lawyer review this item.

At the November 18 meeting, O'Rourke again brought up the question of merit increases. He told the Union that the Company was not giving these increases away and wanted a concession from the Union in exchange for implementing its merit increase program. He suggested an agreement from the Union to forgo any other increases for a year. Again Cremen declined, saying he was not going to forego his right to bargain over a general pay increase. The Company then told the Union it had already distributed certificates to employees with which they could pick up their Thanksgiving turkeys. O'Rourke also said that the Company had followed a practice for a number of years of holding employee meetings from time to time to bring everyone up to date about developments within the Company, and he wanted to be able to continue to do so. Cremen said he had no objections to such meetings so long as the Respondent did not take advantage of these occasions to bargain directly with its labor force.

The Company then presented the Union with a revised package of written proposals. Some of these proposals were identical to the ones submitted at the end of the second negotiating session. There was revised language in the areas of jury duty pay, safety and health, and selective service obligations. The second package contained nothing concerning grievance machinery, arbitration, or seniority. The parties discussed the question of subcontracting bargaining unit work. The Union voiced its objection to the proposal which would permit such subcontracting ''for competitive economic reasons,'' asserting the language was too vague. It did agree to a management proposal that there should be no individual contracts with employees. It disagreed concerning the balance of the newly proposed section 11.2. In the first package of proposals submitted at the end of the second meeting, the Company had proposed that it should be permitted to discuss grievances with employees without the assistance of the Union. Its revised proposal would allow it to discuss ''matters related to wages and working conditions'' directly with employees without Union intervention. Cremen objected to this idea. He also objected to a company proposal that any employee be deemed to have waived any complaint about being shortchanged in his paycheck if he did not present his complaint to the attention of the Company within 2 weeks from receiving the check.

Although the parties agreed on a definition of probationary employees, the question of temporary employees was never resolved. The Company had proposed that it be allowed to employ temporary employees outside the terms of the contract and pay them without reference to contract rates. It did not define what it meant by ''temporary employee'' and would not agree to any limitation of the number of temporary employees that might be on its payroll in this manner at any given time. O'Rourke said on one occasion that he was thinking in terms of 7 months as an appropriate limitation on the length of service for a temporary employee but no formal proposal to this effect was ever advanced or agreed upon. To the Union the distinction between a part-time employee covered by the contract and temporary employee excluded from the contract was obscure, so it insisted on a better definition from the Company to differentiate the two categories. No such definition was ever proposed. O'Rourke admitted that there might be some confusion between temporary employees and probationary employees.

The Union receded from its initial proposal for double time on holidays over and above the regular 8 hours of pay, so agreement was concluded that any employee working a holiday would receive a total compensation equal to twice his normal hourly rate. It also agreed to some flexibility in the scheduling of holidays which fell on weekends. There was agreement on permitting access to the plant by union officials and agreement that the length of probationary service be determined by calendar days rather than working days. There was additional agreement on one or two other minor items but no agreement on management rights or union security. The meeting ended with a presentation by the Union of a revised wage rate schedule.

At the sixth meeting on December 3, O'Rourke handed Cremen a two-page document authorizing proposed merit increases. The first page contained a list of 69 unit employees to whom the Company was proposing to give individual increases ranging from 21 cents to 66 cents an hour. Page 2 contained a list of 26 other employees who were not slated to get merit increases, either because the increases were to be delayed or because the individual was a probationary employee and was not evaluated as a part of the existing merit increase program. O'Rourke again asked Cremen to agree that, if these increases were put into effect, the Union would not ask for an additional wage increase for a year. He also told Cremen that he wanted the document returned because it was confidential and he did not want its contents disclosed

in the plant. One union representative asked O'Rourke if the names of all of the employees in the unit were on the list. O'Rourke replied that they were not. He then asked O'Rourke if the absence of an employee's name from the list meant that the employee would not be getting any wage increase. O'Rourke agreed that this was so.

After a caucus, Cremen told O'Rourke that he would not agree to the listed increases because he did not want to be blamed out in the plant for agreeing to it. He said he reserved the right to negotiate for a general increase and offered a 6-month delay before any such increase might take place, but the Respondent rejected this counterproposal. Cremen told O'Rourke that, if the Union abandoned any effort to obtain a general increase for a year and simply settled for the 1987 merit increases, the employees could conclude that they did not need a union because they would have gotten the merit increases anyway.

Later in that session, the parties agreed that 60 rather than 90 calendar days would define the normal span of probationary employment and that probationary employees would receive all Company benefits except for tuition assistance. When the parties discussed temporary employees, O'Rourke still refused to place a limit on the number of such employees who might be employed at any one given time but agreed to try to come up with a definition of what constituted a temporary employee. At the end of the session, the Union proposed to the Respondent a 7-percent general across-the-board wage increase. O'Rourke rejected it, saying that the Company would go broke if it granted that kind of a pay raise.

The seventh and last negotiating session took place on December 9. Cremen began the session by complaining that he had heard that supervisors were telling employees in the plant how much they were scheduled to receive as merit increases and were not going to get because of objections from the Union. He mentioned that his information concerned employee Jeanine Gardner, a supervisor named Sarah Albertine, and a specific increase to Miss Gardner of 21 cents. O'Rourke denied that such statements were being made at the plant. Cremen further asserted the belief that supervisors were receiving this information directly from Tucker. Tucker said that he had told supervisors only in general terms what had transpired at the December 3 meeting and that he had not informed them of any specific wage rates which the Company had proposed for particular employees. Cremen asked how Sarah Albertine could have known of the particular increase which had been intended for Miss Gardner if she had not learned about it from Tucker. Tucker and O'Rourke replied they did not know.

The Company then told Cremen that it had completed its merit evaluations and were reproposing the same increases they had proposed at the previous meeting. They again asked the Union to agree that there would be no further wage increases for another year. Cremen again declined the offer, so O'Rourke said that the Company would go ahead and give the raises anyhow, retroactive to the last week in November. He went on to state that he was not sure that the Union had the interests of the employees at heart and that the Union should stop insisting on two wage increases in a single year and on union security, adding that so long as these were the Union's positions the Company had nothing further to talk about with the Union. He said that the Union was not reflecting what the employees really wanted and that it should go back and talk to employees and rethink its bargaining positions. O'Rourke then got up from the bargaining table and began to leave, telling the Union that it should get ready for a strike. Cremen replied that the Union was not afraid of a strike if that is what it was going to take. As O'Rourke was leaving, he asked Cremen when they might meet again. Cremen had no dates immediately available so it was left that Cremen should call Tucker to arrange for another negotiating date after the first of the year.

The merit increases proposed by the Respondent were put in effect, as O'Rourke said they would be, effective as of November 30. On December 15, O'Rourke, Tucker, and Burmeister sent a ''Dear Fellow Employees'' letter to each member of the bargaining unit in which they stated:

> As you know, the paycheck you receive Thursday will contain a retroactive payment of higher wages to 11/30 at your increased pay rate.
>
> You also probably know that since late October, the Company has been attempting to implement this wage increase in bargaining with Local 311 in accordance with legal requirements.
>
> Because we expect a long bargaining process (many issues important to you must be agreed to), we proposed to the Union on 10/27 that this increase be part of the contract. They refused to agree to this.
>
> On 12/3 we proposed the wage increase you received.
>
> The Union said they would agree only if we agreed to further increases in 6 months and a Union Shop.
>
> On December 10, we made our proposal again and the Union answered in a similar manner.
>
> We told the Union we can't agree to things like that because we must protect your jobs and the Company now and for the future.
>
> We decided to give the increase anyway because we feel you should not suffer further from the bargaining.
>
> Although we expect to see you at the Christmas Luncheon on December 18, please have a happy, safe and pleasant preholiday period.

Shortly thereafter Cremen met with his attorney. After consultation with counsel, he decided to file the unfair labor practice charge in the instant case and did so on January 6, 1988. Cremen never called the Respondent for another negotiating date, nor did the Respondent ever call him for another general bargaining session.[10]

B. *Analysis and Conclusions*

When negotiations between these parties commenced on September 17, 1987, the Respondent was honoring for the first time a certification of the Union as the exclusive collective-bargaining representative of its production and maintenance employees which was issued nearly 3-1/2 years before. It was responding for the first time to a request for bargain-

[10] The Respondent did contact the Union many months later to request permission to implement additional merit increases and to implement certain health care cost containment measures. The Union's response was an accusation that the Respondent's offer to bargain was disingenous and that the Union had no intention of resuming negotiations until the Respondent recognized its previous violations of the Act, agreed to remedy those violations, and demonstrated a willingness to bargain in good faith.

ing which the Union had served upon it on June 27, 1984. The Respondent did not comply with its duty to bargain, which arose when the Union won a representation election in 1983, until a United States court of appeals had placed it under a decree in 1987 ordering it to bargain. At issue here is whether what the Respondent did after the entry of that decree was merely a continuation of its effort to avoid collective bargaining, an effort which chewed up more than 4 years during which negotiations should have been conducted and bargaining over a contract should have been completed. As the Second Circuit put it:

> Sophisticated pretense in the form of apparent bargaining, sometimes referred to as ''shadow boxing'' or ''surface bargaining,'' see *N.L.R.B. v. Herman Sausage*, 275 F.2d 229, 232 (5th Cir. 1960), will not satisfy a party's duty under the Act; and where years pass the conduct of the parties must be scrutinized carefully, especially when experience discloses that collective bargaining agreements are usually reached in a fraction of that time. [*Continental Insurance Co.*, 495 F.2d 44, 48 (2d Cir. 1974).]

In making this careful scrutiny it is well to observe at the outset that what the Respondent and its principal witness told the Board in the course of a 3-day hearing in this case differs considerably from what the Respondent disclosed to the Union throughout 3 months of bargaining. Much of the testimony given in defense of the Respondent's activities during this period of time dwelt on considerations of the ''strategy'' which the Respondent adopted in light of its perception that it was dealing with a weak bargaining adversary. Whether its adversary was strong or weak, both the Act and the decree of the Fourth Circuit imposed on the Respondent a duty to negotiate for the purpose of concluding a contract with the Union. Any other ''strategy'' is simply another violation of Section 8(a)(1) and (5) of the Act. Moreover, it is what the Respondent did ''on stage,'' not what it said it was going to do while ''waiting in the wings,'' that is entitled to credence. Ideas which were being kicked about by company negotiators during strategy sessions but which never saw the light of day at negotiating sessions mean little in evaluating the question of ''good faith.''

Like the problem which confronts the Board whenever it is called on to determine the true motive behind the discharge of a union adherent, an assessment of whether an employer is engaged in surface bargaining must normally be derived from inferences based on reported conduct rather than upon direct evidence. Although public agencies may not pass judgment on the merits of proposals advanced during bargaining, the Board and the courts have long held that they may examine the contents of these proposals to determine whether a proposal ''is so consistently and predictably unpalatable to the other party that the proposer should know that agreement is impossible.'' *NLRB v. Mar-Len Cabinets*, 659 F.2d 995, 999 (9th Cir. 1981). If so, the making of such proposals will be deemed ''evidence of an intent to frustrate the collective bargaining process.'' *Reichhold Chemicals*, 288 NLRB 69 (1988), citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). In this case, the Respondent never made a complete contract proposal to the Union during the 3 months they were engaged in negotiations, although it had before it from the time of the first negotiating session a complete Union proposal, including a detailed wage offer.[11] The Company's response to the Union and to its duty to bargain was to present an array of bizarre, off-the-wall ideas which, in some instances, it admitted at the hearing it knew the Union would never accept.

The only document of its own which the Respondent proffered at the first negotiating session was a *management functions* proposal. Later, it reproposed that item as a part of two successive packages that it presented to the Union. On each occasion Cremen rejected it, saying that, if the Union agreed to this proposal, it would be giving up its rights to ''represent the people.'' The duty to bargain, as defined in Section 8(d) of the Act, extends to ''wages, hours, and terms and conditions of employment.'' If adopted, this proposal would give the Company, during the contract term, the complete unilateral right to establish or change shifts, schedules of work and production schedules and standards; the right to establish, change, combine, or eliminate jobs, positions, classifications, and descriptions; the right to establish or change incentive or bonus compensation; the right to maintain order and efficiency; the right to subcontract work or transfer it out of the plant to another company plant; the right to make and enforce safety, security and work rules, as well as rules of conduct; the right to determine the number of employees, the assignment of their duties, and the right to change, increase, or reduce those duties. It also would give the Company the complete right to suspend, schedule, discharge, lay off, recall, demote, or promote employees. No restrictions would exist by contract to limit the exercise of these powers and no recourse could be taken to the grievance machinery by any employee adversely affected by such actions. In short, the setting of wages, hours, and terms and conditions of employment would continue to be under complete management control, as they had been before the representation election and for several years thereafter. Cremen's shorthand description of this proposal, made on several occasions and quoted above, was quite accurate. O'Rourke apparently felt that he was satisfying his duty to bargain when he persisted in asking Cremen to go over the proposal and tell company officials what he specifically did not like about it and why. Cremen did not like anything about the proposal and he told O'Rourke as much. The Supreme Court long ago pointed out that ''the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences.'' *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). A lengthy discussion on a proposal

[11] One of the defenses advanced by the Respondent at the hearing was that the Union was responsible for the breakdown in negotiations which occurred because it did not do its homework and came to the bargaining table unprepared. Such a dereliction on the part of a union is not an excuse for bad-faith bargaining on the company's part, but it has no foundation in the facts adduced in this record. Cremen actually prepared certain bargaining proposals back in 1984 when he made his original request for negotiations. When that request was finally honored 3-1/2 years later, he and other union officials held a meeting with the members of the bargaining unit, at which time an in-plant bargaining committee was selected. They also solicited and obtained suggestions for proposals which were then incorporated into the detailed and comprehensive contract proposal that the Union provided to the Respondent in advance of the first negotiating session. The Union was represented by agents with years of negotiating experience, whose full-time occupation is negotiating and administering the terms of 125–150 contracts in the Baltimore metropolitan area. The contention that the Union came to the bargaining table unprepared because its agents had been misinformed by their constituency concerning a few minor items of current shop practice is without merit.

asking the Union to relinquish its right to bargain about wages, hours, and terms and conditions of employment could be nothing more than a sterile discussion of union-management differences, more appropriate to a preelection campaign than to a collective-bargaining session. Requests to engage in such discussions are more in the nature of attempts to waste time than to satisfy a duty to bargain.

O'Rourke admitted in his testimony that he knew that the management-rights proposal, to which Cremen voiced such strong and repeated objection, would be unacceptable to the Union. In referring to this proposal, O'Rourke testified that ''when we first looked at it . . . we had a conscious decision to set this thing up so that we could move from it and—and give—give parts of it away as we . . . were negotiating.'' He flatly admitted that he did not expect the Union to agree to it and he expected to modify it as negotiations wore on. However, he also admitted that the Company never did recede from the proposal nor tell Union negotiators that it would do so. I discredit his self-serving assertion.

One of the particular elements of the *management functions* proposal which O'Rourke addressed in his testimony was the unlimited right to grant discretionary merit increases to bargaining unit personnel. O'Rourke stated: ''I wouldn't expect the union to sign a contract that allows the company to give discretionary increases on as broad a basis as described'' in the company proposal. However, the Respondent never receded in any way from that particular proposal. As explained by O'Rourke, ''we never got to that.'' Respondent proffered a similar excuse relating to a proposal giving the Company the unlimited discretion to assign supervisors and other nonunit employees to do bargaining unit work. O'Rourke said that the Company backed away from this proposal by virtue of a subsequent proposal submitted in its second package. However, the proposal he referred to gave the Company the right to subcontract bargaining unit work ''for economic reasons,'' a term the Respondent never defined, so the protection afforded unit personnel by the Company's revised proposal, over and above the Company's first and predictably unacceptable offer, was illusory at best.

The Company also proposed that it be allowed to strike two entire arbitration panels before being confronted with a panel from which it would be required to select an arbitrator. This unusual proposal was denounced by Cremen as time-wasting; its effect on delaying the processing of cases in arbitration is obvious. The Respondent never gave the Union or the Board the slightest justification or explanation for such a strange proposal. Its failure to do so is additional evidence of an intention to waste time on proposals which would predictably be unacceptable. See *NLRB v. A-1 King-Sized Sandwiches*, 732 F.2d 872, 876 (11th Cir. 1984). The *management functions* clause discussed above gave the Company the unlimited right to discharge employees, as well as to take a host of other enumerated personnel actions. The Company's arbitration clause should be read in tandem with management rights secured elsewhere in the proposed agreement. Arbitrators would be permitted to adjudicate discharge cases, but under the company-proposal, they would not be allowed to order reinstatement or backpay, two conventional remedies in any arbitration case. If employees did not like an award, they could strike, but the strike would be deemed an economic strike in which they would be risking their jobs to obtain a remedy which the contract precluded the arbitrator from granting. In light of the sweeping provision outlined above giving management the unlimited right to discharge, it is difficult to know what kind of a discharge case could arise in which an arbitrator could make a finding against the Company, since management would not have to prove ''just cause'' for its action, a requirement normally found in collective-bargaining agreements. About the only occasion in which an arbitrator, acting under a contract envisioned by the Respondent, could make a finding against the Company in a discharge case would be for a discharge which infringed upon some statutory employment right, such as an unfair labor practice discharge or a firing which violated a civil rights law. Hence, the proposal that strikes to enforce arbitration awards be deemed economic strikes is in essence a proposal that employees relinquish their rights under Section 7 of the Act. Just such a proposal was deemed evidence of surface bargaining in *NLRB v A-1 King-Sized Sandwiches*, supra.

The Respondent's proposal that an employee should forfeit what might, in some cases, be many years of seniority because of a single failure to call in sick was certainly harsh, vindictive, and unreasonable, to use the terminology often applied to predictably unacceptable proposals. Its proposals relating to the policing of the contract by the Union was little better. The Respondent would have limited the Union to one steward to serve approximately 125 employees. He could investigate and process complaints only on breaktimes or off-duty times and, as Cremen pointed out, since the Respondent would not agree to any stated contractual break periods, a steward might not have any time available to him to perform his contractual responsibilities. Originally the Respondent proposed that outside union representatives be allowed on Company premises only with management's permission. Under such circumstances they could be absolutely precluded from coming to the assistance of an overworked steward as he tried to perform his duties. Even when the Respondent agreed that Union agents would not unreasonably be denied access to the plant, it still adhered to another facet of its grievance proposal which would permit Union agents to be excluded from any participation in the first two steps involved in the processing of a grievance. Here again, the Respondent was proposing that the Union agree to abandon its duty of ''representing the people,'' this time in the area of contract administration.

The certification which the Respondent was obligated to honor drew no distinction between temporary employees and permanent ones, nor did it draw any distinction between full-time and part-time employees. All were part of the bargaining unit and all were entitled to be covered by the terms and conditions of any contract negotiated by the parties. The Respondent proposed that temporary employees be excluded from the coverage of the agreement and that the Company be given the unilateral right to establish their wages. Of real consequence to permanent members of the unit was the fact that the Respondent did not define ''temporary'' and would not agree to any limitation on the number of temporaries who might be hired at any one time. Theoretically, part-timers might be hired to perform all bargaining unit work. Respondent promised the Union to come up with a definition of ''temporary,'' but, as in so many other matters, it never got around to it. These proposals, taken together with what

was omitted from them, seriously threatened to erode the bargaining unit.

In some instances, the Respondent proposed that the Union enter into a contract providing employees with less than they were currently enjoying without a contract and without a union to represent them. The Respondent proposed that an employee be precluded from objecting to an error in his paycheck if he failed to complain about the error within 2 weeks. The current statute of limitations for unpaid wages is 3 years. The employer was then paying its employees time and one-half for any work in excess of 8 hours in any 1 day. It proposed to pay overtime only for work performed in excess of 40 hours in any 1 week, as required by Federal law. Employees were currently enjoying specified morning and afternoon breaks, as well as a specified lunchbreak. Respondent proposed that the Union enter into a contract providing that breaks would only take place when and if the foreman decided to call them. The limitation proposed by the Company on the right of employees to strike in support of a grievance was less than they would have enjoyed without a contract, since, in the absence of a binding no-strike commitment, employees have the right to strike at any time in support of any grievance or bargaining demand. *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). When Cremen protested that the Company, in some instances, was offering less than current benefits, O'Rourke's only response was that ''bargaining starts from scratch.'' It is evident from these and other aspects of the Respondent's behavior over a period of several months that it intended to see that bargaining never got much beyond ''scratch.''

The parties were strongly at odds over the question of union security. Cremen proposed a conventional 30-day union-security clause, told the Company that this provision was important to him, and stated that he rarely signed a contract without one. O'Rourke was adamant that a contract should contain no such provision. When Cremen asked O'Rourke why the Company was willing to agree to a union-security clause in its New Jersey contract but was holding out against one at Dundalk, O'Rourke simply pointed to the size of the vote at the 1983 representation election, which the Union had won by a margin of 59 to 56. Again and again O'Rourke brought up the question of union security at negotiations as if to goad the Union, once even proposing to agree to guaranteed breaks which the employees were currently enjoying if the Union would just forget about a union shop provision. O'Rourke explained in the record the reason for his stance: ''I think it involved the fact that we wanted—we wanted to be sure that the union understood that there were 56 employees that had voted that they didn't want to have union representation and that we felt that we—we three guys on the company's side of the table—were representing those employees.'' Cremen asked O'Rourke how could he tell after 4 years which of the 56 ''no'' voters were still in the plant, but O'Rourke gave no meaningful response.

The Respondent's asserted reason in justification of its opposition to a union shop is diametrically opposed to a fundamental concept embodied in the Act. On receiving a certification, a union is both obligated and entitled to represent every employee in the bargaining unit, irrespective of how that employee may have voted in a representation election. An employer is not entitled at negotiations to represent any employee in the bargaining unit; its sole duty is to its shareholders. When, as here, an employer attempts to interpose itself between a bargaining agent and the constituency that the union is entitled to represent, its effort is not only patronizing and pretentious but contrary to a basic intendment of Federal law. By the statement quoted above, as well as by many other similar statements in this record, the Respondent asserted that it was refusing to agree to a union shop proposal advanced by the bargaining agent because it wanted to stand between the Union and the members of its bargaining unit, thereby acting as the protector of these employees against the organization which was legally entitled to assume that mantle. This posture is the essence of bad faith, and what sprang from that posture is quintessential bad-faith bargaining. However, it never made any proposal of its own, either as to wages or as to health, welfare, and pension benefits. O'Rourke testified that, at a strategy session on December 22, company officials were thinking about formulating a wage proposal but none was ever formulated and none was ever presented. Respondent's only excuse was that it never got a chance to do so. The excuse is so patently silly that it requires no further discussion. All that this testimony reveals is the fact that the Respondent was beginning to realize that it was becoming late in the day to claim that it was bargaining in good faith while not making any economic offers.

It is apparent from this record that the Respondent has never come to grips with the fact that an election was held in its Dundalk plant and it lost. Its whole attitude, throughout the fall of 1987 and beyond, has been that negotiations were simply a continuation of the campaign it had been waging for 4 years to keep the Union out of the plant entirely. It riled union negotiators by going behind their backs and distributing copies of Company and union proposals to every employee at the plant. Its stated reason for doing so was to let employees know that the Union was doing just what the Company had always said it would do if the Union won, namely insist on union shop and checkoff. After negotiations were essentially broken off on December 9, the Respondent communicated directly with employees to let them know that they were going to get merit increases after all because the Company had insisted that this had to be done, notwithstanding bargaining ploys on the part of union negotiators who would consent to these raises only if they were tied to agreements on union shop and further raises in 6 months.[12] The obvious intendment and effect of this direct communication with bargaining unit members was to disparage the Union and make the claim that it was the Company, not the Union, who was looking out for them in negotiations. Although an employer may direct communications to unit employees during negotiations under certain circumstances, an effort ''to portray the employer rather than the union as the workers' true protector remove(s) such speech from the penumbra of protection and may constitute an unfair labor practice.'' *NLRB v. United Technologies Corp.*, 789 F.2d 121, 134 (2d

[12] In its December 15 letter to employees, the Respondent included at least one falsehood and one half-truth. In this letter, it stated that it had proposed to the Union that merit increases be included in the contract. O'Rourke took great pains at the hearing to state that he was proposing a gentlemen's agreement on merit increases, namely the granting of these raises in such a manner that they would not have to be included in a contract but could be repudiated down the line in further bargaining. The letter also failed to tell the Union's constituents that the Company proposed repeatedly that merit increases be granted only in exchange for an agreement on the part of the Union that it would ask for no other wage increases for a year.

Cir. 1986). While the General Counsel does not allege that this letter was per se an unfair labor practice, it is certainly convincing evidence of overall subjective bad faith on the part of the Respondent.

Although the Respondent attempts to excuse its behavior on the basis that the parties did in fact reach agreement on a number of items before negotiations went sour, its claim is illusory. With minor exception, Cremen was correct in saying that there was no agreement on any matter which did not reflect either the Company's existing practice or a requirement of Federal law. The sole exception to this claim among the items of agreement listed by the Respondent in its brief is an agreement to pay an increased amount of call-in pay on holidays. The impact of this concession can be judged by O'Rourke's testimony that the Company never called in any employees to work on a holiday, and an extraordinary emergency would have to exist before it ever would do so.

The Company broke off negotiations on December 9 with a warning from O'Rourke to Cremen that the Union had better get ready for a strike. Much has been made of the fact that O'Rourke left it to Cremen to call for another bargaining session and Cremen never called. However, O'Rourke's stated willingness to resume negotiations was at best conditional. He told Cremen in no uncertain terms before walking out that, so long as the Union was asking for both a general increase and merit increases and was insisting on a union shop, the Company had nothing more to say to them. This was its bargaining stance before making any major economic proposals.

A revealing glimpse into the core of the Respondent's illegal negotiating ''strategy'' can be obtained in the matter of the ''gentlemen's agreement'' which O'Rourke proposed relative to merit increases. O'Rourke testified that, in late October, the Respondent was under real pressure from its employees to grant some kind of a pay raise. In the Respondent's mind this pressure came from bargaining unit voters of all persuasions. It feared that, if it did not produce as expected and as it had in previous years, it faced the real possibility of a strike at a critical season in its production year. Moreover, new employees, who might serve as strike replacements, were not readily available at the wages the Respondent was then paying. To get over this practical and immediate hurdle without giving anything away at the bargaining table, it proposed to the Union that it be empowered to make annual evaluations and give merit increases based on those evaluations, separate and apart from the negotiations which were then in progress. By gentlemen's agreement O'Rourke meant that any merit raises which might result from November evaluations would not have to be reflected in the provisions of any final contract, and that either party might be free to disavow and repudiate them in the course of any bargaining which might follow. The obligation imposed by the Act on negotiators is to bargain in good faith and, on agreement, to embody the results of those agreements in a signed written document. What the Respondent was proposing was an interim agreement which would permit it to get past a sticky situation in the plant but avoid placing the results of that agreement into a final contract. In so doing, it was also violating a fundamental tenet of good-faith bargaining, namely to make the results of agreements part of a written document on which all parties sign off. When O'Rourke's proposal was made to Cremen, his reply was ''this isn't bargaining,'' and indeed it was not.

The many indicia of bad faith exhibited by the Respondent involved not only what it proposed but what it failed to propose. Over a period of 3 months, in seven bargaining sessions, the Respondent spent a great deal of time and required all parties to endure the lengthy consideration of a large number of far-out proposals, discussed above, although it failed to propose anything at all concerning the heart of collective bargaining, namely, economics. The Respondent had received from the Union two detailed wage proposals, both broken down by job classification, and it had also received a general across-the-board proposal for an increase of 7 percent. All these it rejected out of hand. No participant in collective bargaining, on either side of the table, ever expects that a contract can be concluded without agreement on wages and health insurance. O'Rourke implicitly recognized this reality, but his excuse for failing to come forward with any wage offer at all was that he did not have the time to do so before negotiations broke off. His excuse borders on the absurd. O'Rourke never explained why it took so long to formulate a wage offer; the Union was able to do so before negotiations ever began and with much less data at its disposal than the Company possessed. O'Rourke was able to find time during these 3 months for proposals which were predictably unacceptable, but he asserted, with a straight face, that, during that same period, he never had the time even to formulate, much less present, a serious wage offer. It is clear that the Company never formulated a wage offer because it never intended to come to an agreement with the Union on wages and was intent on continuing its existing practice of establishing wages on a unilateral and individual basis through its annual merit increase system. This is exactly what the Company did in 1987 and again in 1988. It never deviated from that practice at any time and never proposed to do so.

One final consideration portrays the Respondent's contempt for the collective-bargaining process and a fixed intention to avoid participating in it in any meaningful way. At the end of the second session the Respondent proposed that discharge grievances—the only imaginable kind of grievance which could possibly arise in light of its sweeping of its management functions proposal—be settled ultimately by a strike in which strikers could forfeit their jobs. At the final session, O'Rourke stated to Cremen, as he was getting ready to walk out, that the Union should get ready for a strike. Challenging employees to strike rather than attempting to resolve differences by collective bargaining or by arbitration—a form of collective bargaining—is an indicia of bad faith and a revealing insight into the Respondent's actual strategy. O'Rourke testified that he felt that problems which had given rise to the Union victory in the 1983 election had been solved. He also disclosed management's assessment that the Union's negotiating posture was weak. This testimony could have no other meaning than to announce a belief on the part of the Company that it could win a strike, that it could replace any Union dissidents still in the shop, and could then continue to operate its business in the same union-free atmosphere it enjoyed before a representation election was

held in 1983.[13] The pursuit of a course of action designed to turn the clock back to a time when the Company was under no obligation to bargain with the Union at all discloses what the Company was really up to when it met with the Union on seven occasions during the fall of 1987. In light of this and of all the other facets of the Respondent's behavior during a time when it was supposed to be working out a contract with the Union, I conclude that it was engaged in surface bargaining and violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Hydrotherm, Inc. is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Petroleum, Construction, Tankline Drivers, Yeast, Soft Drink Workers and Driver-Salesmen, Amusement and Vending Servicemen and Allied Workers, Local Union No. 311 of Baltimore and Vicinity, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at Respondent's Dundalk, Maryland, facility, including maintenance/utility employees, assemblers, machine operators, testers, inspectors, brazers, painters, welders, machinists, set-up operators, material handlers, store keepers, shipping and receiving clerks, tool and die makers, but excluding managerial employees, lead supervisors, office clericals, schedulers, expediters, production control clerks, quality assurance technicians, purchasing agents, industrial and manufacturing engineers, professional employees, confidential employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain collectively in good faith with the Union, the Respondent has violated Section 8(a)(5) of the Act.

6. The aforesaid unfair labor practice violates Section 8(a)(1) of the Act and has a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has committed various unfair labor practices, I recommend that it be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. I recommend that the Respondent be required to bargain collectively in good faith with the Union and, if an agreement is reached, to embody the terms of that agreement in a signed written instrument. Because the Respondent has never honored the certification which the Board issued to the Union on June 11, 1984, I recommend that the certification year be extended to run for a period of 1 year commencing from the date that it begins to bargain in good faith. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). I recommend that the Respondent be required to post the usual notice advising its employees of their rights and of the results in this case, and I further recommend that any further violations of Section 8(a)(1) and (5) of the Act on the part of this Respondent be prosecuted as contempt of a decree of the United States Court of Appeals for the Fourth Circuit, a decree which this Respondent has yet to comply with.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Hydrotherm, Inc., Dundalk, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the production and maintenance employees at its Dundalk, Maryland plant.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all of the employees employed in the aforesaid collective-bargaining unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the same in a signed written agreement.

(b) Post at its Dundalk, Maryland plant copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on June 11, 1984, be, and the same is, extended for a period of 1 year commencing from the date on which the Respondent begins to comply with the terms of this Order.

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[13] O'Rourke testified:

> [A]t about the fourth meeting, when we came away from that, we decided that we were going to take a very hard approach to bargaining and we were going to, in effect, make the union work for everything they had.

I construe these remarks as really meaning that they were going to make the Union strike for everything they wanted.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith with Petroleum, Construction, Tankline Drivers, Yeast, Soft Drink Workers and Driver-Salesmen, Amusement and Vending Servicemen and Allied Workers, Local Union No. 311 of Baltimore and Vicinity, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive collective-bargaining representative of the production and maintenance employees employed at our Dundalk, Maryland plant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively and in good faith with the Union as the exclusive bargaining representative of our Dundalk, Maryland production and maintenance employees and, if an understanding is reached, WE WILL embody that understanding in a signed, written agreement.

HYDROTHERM, INC.